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342 U.S.
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In the

Supreme Court of the United States

October Term, 1951

No. 332

J. B. EDWARDS, SECRETARY-TREASURER RELIANCE CLAY PRODUCTS COMPANY, Individually, and RELIANCE CLAY PRODUCTS COMPANY,
Petitioners,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

FRITZ LANHAM LYNE,
1010 Republic Bank Building,
Dallas, Texas,
Counsel for Petitioners.

WARLICK LAW PRINTING CO., INC. — *Law Brief Printing* — Dallas — HArwood-9310

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NATIONAL LABOR RELATIONS BOARD,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. B. Edwards, Secretary-Treasurer Reliance Clay Products Company, individually, and Reliance Clay Products Company, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above styled case on June 30, 1951, petition for rehearing having been denied on August 10, 1951.

OPINIONS BELOW

The judgment of the District Court (Tr. p. 38) is unreported. The opinion of the United States Court of Ap-

peals (Tr. p. 49) is reported in *189 F. 2d 970*. The order of the United States Court of Appeals denying petition for rehearing (Tr. p. 57) is unreported.

JURISDICTION

The judgment of the United States Court of Appeals was entered on June 30, 1951 and the order of the United States Court of Appeals denying petition for rehearing was entered on August 10, 1951. The jurisdiction of this court is invoked under 28 U. S. C., Section 1254 (1).

QUESTION PRESENTED

Whether a Regional Director of the National Labor Relations Board has the authority to issue a subpoena in a case arising under Section 10 of the Labor Management Relations Act, 1947 (Act of June 23, 1947, Public Law 101, 80th Congress).

STATUTE INVOLVED

The pertinent statutory provisions are printed in Appendix A, *infra*, p. 13.

STATEMENT

The General Counsel of the National Labor Relations Board, through the Regional Director of the Sixteenth Region, issued a complaint, under Section 10[1] of the Labor Management Relations Act, 1947, alleging that Reliance Clay Products Company had engaged in unfair labor practices within the meaning of Section 8 (a) (1) and (3) of said Act. (Tr. pp. 11-14). The case was set for hearing

(1) Section 10, Labor Management Relations Act, 1947, has to do with the prevention of unfair labor practices.

before a Trial Examiner of the National Labor Relations Board on May 23, 1950.

The Regional Director of the Sixteenth Region of the National Labor Relations Board issued subpoena duces tecum No. B-14179 commanding J. B. Edwards, Secretary-Treasurer of Reliance Clay Products Company to appear before a Trial Examiner of the Board, and to bring with him certain records of said company, which were described in a sheet attached to said subpoena. (Tr. pp. 17-19).

The facts surrounding the issuance of this subpoena were stipulated to by the parties as follows:

"The parties hereby stipulate that the subpoena duces tecum, B-14179, issued in the instant case, was issued pursuant to the general procedure followed by the National Labor Relations Board; that under this procedure the Regional Office is supplied by the Washington Office of the National Labor Relations Board with blank forms bearing the seal of the National Labor Relations Board and a stamped signature of a member, in the instant case, John M. Houston;

"That when an application for a subpoena is filed by a party to a proceeding, the Regional Director inserts the name of the party to be served into one of those blank subpoena forms over the seal of the National Labor Relations Board and over the stamped signature of a member of the National Labor Relations Board;

"That the party requesting the subpoena is then responsible for filling in the other blanks of the form and for the service of the subpoena.

"It was further stipulated that in the instant case, application was made by counsel for the General Counsel to the Regional Director for the issuance of a subpoena duces tecum;

"That the Regional Director approved the application; and that on May 16, 1950, at the Sixteenth Regional Office, the names, dates, and other matter including the matter on the sheet attached to the subpoena were by, or at the direction of said Regional Director typed into the blank subpoena form over the stamped signature of John M. Houston, a member of the Board, and over the seal of the National Labor Relations Board; and that said subpoena was served by registered mail and received by the Respondent on May 18, 1950." (Tr. pp. 20, 21).

On May 23, 1950, petitioners filed with the Trial Examiner a petition to revoke said subpoena upon the grounds set forth therein. (Tr. pp. 21-26).

The petition was denied in part and granted in part by the Trial Examiner. (Tr. pp. 26-30).

Upon petitioners insistence that the said subpoena was void, respondent filed an application with the United States District Court for the Northern District of Texas, Dallas Division, asking for an order requiring petitioners to comply with said subpoena. (Tr. pp. 1-10).

On July, 24, 1950, the District Court entered its order dismissing respondent's application on the ground that the subpoena was too broad with respect to the matter which is called upon petitioners to produce. (Tr. pp. 37, 38).

On August 1, 1950, the District Court entered its order setting aside its previous order of July 24, 1950, and ordered petitioners to comply with said subpoena as modified by said court in its order of August 1, 1950. (Tr. pp. 38-40).

The United States Court of Appeals for the Fifth Circuit affirmed the order of the District Court on the authority of *N. L. R. B. v. John S. Barnes Corp., 178 F. 2d 156 (U. S. Ct. of App., 7th Cir., 1949)*, and denied a petition for rehearing.

SPECIFICATION OF ERRORS TO BE URGED

The United States Court of Appeals erred:

1. In holding that a Regional Director of the National Labor Relations Board has the power to issue a subpoena.

2. In failing to hold that the subpoena here in question is void.

3. In holding that the National Labor Relations Board has the authority to delegate its subpoena power to a Regional Director.

4. In affirming the order of the District Court.

REASONS FOR GRANTING THE WRIT

1. The decision in this case in the court below appears to be directly in conflict with the decision of this Honorable Court in the case of *Cudahy Packing Co. of Louisiana v. Holland, 315 U. S. 357, 62 S. Ct. 651, 86 L. Ed. 895 (1942)*.[2] The question presented by the *Cudahy* case was stated by Chief Justice Stone as follows:

(2) For convenience of the court the majority opinion in the *Cudahy* case is printed as Appendix B, *infra*, pp. 15-21.

> "Whether under the Fair Labor Standards Act, * * * the Administrator of the Wage and Hour Division of the Department of Labor has authority to delegate his statutory power to sign and issue a subpoena duces tecum."

The question presented in this case is whether under the Labor Management Relations Act, 1947, the National Labor Relations Board has authority to delegate its statutory power to issue a subpoena duces tecum. This Honorable Court in the *Cudahy* case held that the Administrator of the Wage and Hour Division of the Department of Labor had no authority to delegate his subpoena power to a regional director. The lower court in this case held that the National Labor Relations Board did have authority to delegate its subpoena power to a regional director, and in so holding relied on the case of *N. L. R. B. v. John S. Barnes Corp., et al., 178 F. 2d 156 (U. S. Ct. of App., 7th Cir., 1949)*. The U. S. Court of Appeals for the Seventh Circuit in the *Barnes* case held that the National Labor Relations Board had authority to delegate its subpoena power to a regional director in a case arising under Section 9 of the Labor Management Relations Act, 1947,[3] and in said opinion after attempting to distinguish the *Cudahy* case from the *Barnes* case stated: "* * * We do not consider the Cudahy decision as controlling this case." The Seventh Circuit was in error in not following the *Cudahy* decision of this Court, and the Fifth Circuit was in error in the instant case in following the *Barnes* decision rather than the *Cudahy* decision. The statutory provisions applicable in the *Cudahy* case and in the instant case are almost identical,

(3) Section 9, Labor Management Relations Act, 1947, has to do with the determination of questions concerning representation of employees.

and the reasoning of this Honorable Court in the *Cudahy* case is clearly applicable to the present case. It, therefore, follows that the decision of the lower court in this case conflicts with the decision of this Honorable Court in the *Cudahy* case.

2. The decision in this case in the court below directly conflicts with the principle announced by this Honorable Court in the case of *Fleming v. Mohawk Wrecking and Lumber Co., et al., 331 U. S. 111, 67 S. Ct. 1129, 91 L. Ed. 1375 (1947)*. The question presented by the *Mohawk* case was stated by Mr. Justice Douglas as follows:

> "These cases present the question whether the Emergency Price Control Act * * *, authorizes the Administrator to delegate to district directors authority to sign and issue subpoenas."

This Honorable Court in the *Mohawk* case held that the Administrator of the Emergency Price Control Act did have authority to delegate his subpoena power to district directors,[4] and in said decision this Honorable Court distinguished the *Mohawk* case from the *Cudahy* case because of the language of the two statutes involved.[5] In the *Mohawk* case Mr. Justice Douglas in delivering the opinion of the court stated:

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(4) In the *Mohawk* case the Administrator of the Office of Price Administration *by order* delegated the function of *signing and issuing* subpoenas to regional administrators and district directors. In the instant case the National Labor Relations Board has not either by order, rule or regulation delegated the function of signing or issuing subpoenas to regional directors in cases arising under Section 10 of the Labor Management Relations Act, 1947.

(5) The Emergency Price Control Act gave to the Administrator broad rule-making power concerning which this Court said:

"Such a rule-making power may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld."

> **"To tempt the Administrator to solve the problem by supplying all his offices with subpoenas signed in blank would not further the development of orderly and responsible administration."**

The very practice condemned by Mr. Justice Douglas was the very practice that was followed in the instant case. As the stipulation of the parties in the instant case reflects, the regional office of the National Labor Relations Board was supplied by the Washington office of the National Labor Relations Board with blank subpoena forms bearing the seal of the National Labor Relations Board and a **stamped** signature of a member of the Board. The practice followed in the instant case is, therefore, clearly in conflict with the principle announced by this Honorable Court in the *Mohawk* case.

3. The question presented by the instant case is extremely important with regard to the use of subpoenas by various administrative agencies, as an opinion by this court will act as a guide for all administrative bodies. This Honorable court has announced one principle under the *Cudahy* case and another principle under the *Mohawk* case, the distinction being drawn on the applicable statutory wording in each case. After the decision in the *Cudahy* case, and prior to the decision in the *Mohawk* case the law on this point was well settled, and numerous lower courts followed the *Cudahy* case.[6] However, since the *Mohawk* decision, it

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(6) *Minnesota Mines, Inc. v. Holland, 126 F. 2d 824 (U. S. Ct. of App., 10th Cir., 1942); Porter v. Mohawk Wrecking and Lumber Co., et al., 156 F. 2d 891 (U. S. Ct. of App., 6th Cir., 1946); Bowles v. Abendroth, 64 F. S. 704 (D. C., Ore., 1946); In re Mohawk Wrecking and Lumber Co., et al., 65 F. S. 164 (D. C., E. D., Mich., S. D., 1946); Bowles v. Brown, et al., 68 F. S. 136 (D. C., N. J., 1946).*

has not been clear what the applicable law would be in regard to a similar case arising under a statute different than the statutes construed in those two cases, as for example, the instant case. The public at large has a right to know what employees of federal administrative bodies have the power and authority to command the presence of their persons and property at a designated time and place in answer to a subpoena. It is safe to assume that the number of our nations federal administrative bodies shall continue to grow rather than to decline in the years to come. The subpoena is a powerful instrument, specifically designed to interfere, to a certain extent, with personal and property rights. If allowed to be exercised by irresponsible persons, it can be an instrument of great abuse. It is extremely important, in these days of increasing federal investigations, that the public know what minor officials have the power and authority to subpoena their persons and records. Settlement of the question presented by the instant case by this Honorable Court would be plainly in the public interest, for until this Honorable Court decides said question, the same or similar questions will continue to be presented to various courts throughout the nation.

4. The decision of the court below is believed to be erroneous, and it is further believed that the applicable law to the question presented by the instant case was announced by this Honorable Court in the *Cudahy* case. The applicable statutory provision in the instant case provides that "*The Board, or any member thereof shall* * * * issue * * *

subpenas * * *."[7] (Emphasis ours). The statute gives the Board no authority to delegate its subpoena power. This is conceded in the *Barnes*[8] case, which was quoted as the authority for the decision of the lower court in the instant case, although the Seventh Circuit in the *Barnes* case proceeded to presume such authority. After looking at the wording of the Labor Management Relations Act, 1947, and finding no express authority in the National Labor Relations Board to delegate its subpoena power to a regional director, we are left with the proposition that if the regional director has such a power, it must be derived by implication. We then look to the published Rules and Regulations of the National Labor Relations Board[9] to determine whether the Board, in its interpretation of the Act, has implied such a power. Such examination reveals that the Board has not implied such a power, and that the Board with respect to cases arising under Section 10 of the Act has expressly said that only a member of the Board has such power.[10] This is consistent with the wording of the

(7) The full text of Section 11 (1) Labor Management Relations Act, 1947, is printed as Appendix A, *infra*, p. 13.

(8) *N. L. R. B. v. John S. Barnes Corp., et al., 178 F. 2d 156, supra*, pp. 5, 6.

(9) Rules and Regulations Series 5 of the National Labor Relations Board. Said Rules and Regulations were published in the Federal Register and became effective on August 22, 1947 (12 Fed. Reg. 5656). Amendments were issued by the Board on August 18, 1948, and were published and became effective on August 21, 1948 (13 Fed. Reg. 4872). Amendments were issued by the Board on December 2, 1949, and were published in the Federal Register to become effective January 1, 1950.

(10) Section 203.31, Rules and Regulations Series 5 of the National Labor Relations Board provides:

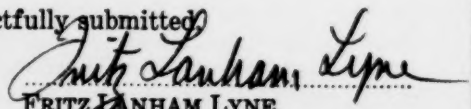
"(a) *Any member of the Board* shall, on the written application, of any party, forthwith issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control * * *." (Emphasis ours).

statute. We then examine the cases and find that this Honorable Court in the *Cudahy* case, involving the same question under a similar statute, held that an administrative body could not delegate the power to subpoena to a subordinate.[11] We also find that the very practice followed in the instant case has been expressly condemned by this Honorable Court in the *Mohawk* case.[12] In view of the foregoing, it necessarily follows that the subpoena in the instant case was issued by the regional director without authority and is consequently void, and the lower court clearly erred in not so deciding.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,



FRITZ LANHAM LYNE,
1010 Republic Bank Building,
Dallas, Texas,
Counsel for Petitioners.

September 14, 1951.

(11) This Honorable Court therein stated:
"Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred." Appendix B., *infra*, p. 18.

(12) *Fleming v. Mohawk, 331 U. S. 111, 67 S. Ct. 1129, 91 L. Ed. 1375 (1947), supra, p. 7.*

APPENDIX A

Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C., Supp. I., Sec. 141, et seq.

"Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10.

> "(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States on any Territory or possession thereof, at any designated place of hearing."

APPENDIX B

Cudahy Packing Co. of Louisiana v. Holland, 315 U. S. 357, 62 S. Ct. 651, 86 L. Ed. 895 (1942).

Mr. Chief Justice STONE delivered the opinion of the Court.

Of the several questions raised by this record only one requires our attention: Whether under the Fair Labor Standards Act, 52 Stat. 1060, 29 U. S. C. sec. 201, et seq., 29 U. S. C. A. sec. 201, et seq., the Administrator of the Wage and Hour Division of the Department of Labor has authority to delegate his statutory power to sign and issue a subpoena duces tecum.

On application of respondent, pursuant to sec. 9 of the Act, the District Court for Eastern Louisiana ordered petitioner to show cause why it should not be compelled to obey a subpoena duces tecum. The subpoena, issued by a regional director of the Wage and Hour Division, commanded the production at New Orleans, Louisiana, before a specified officer of the Division, of all books, papers, and records showing for a period of eighteen months after the effective date of the Wage and Hour provisions of the Act the hours worked by employees each working day and each working week, all wages paid, all purchases made and shipments received, and all goods sold, shipped, delivered, transported, or offered for sale at petitioner's Shreveport, Louisiana plant.

The District Court denied petitioner's motion to dismiss the proceeding for want of jurisdiction, and ordered it to produce the demanded books, papers, and records relating to wages and hours, but left undecided, until again presented to the court in the course of investigation, the further question whether the books and records relating to purchases and shipments specified in the subpoena should be produced. The Court of Appeals for the Fifth Circuit affirmed, Cudahy Packing Co. v. Fleming, 119 F. 2d 209, specifically ruling that the subpoena was validly issued and that the court had jurisdiction to enforce it. We granted certiorari, 314 U. S. 592, 62 S. Ct. 87, 86 L. Ed.—on a petition which presented as a ground for reversal the want

of authority in the regional director to issue the subpoena and, as a reason for allowing the writ, the conflict on this point of the decision below with that of the Circuit Court of Appeals for the First Circuit in Lowell Sun Co. v. Fleming, 120 F. 2d 213, certiorari granted, 314 U. S. 599, 62 S. Ct. 112, 86 L. Ed.—

By Sec. 11 of the Act the Administrator and his designated representatives are authorized to conduct investigations which he may deem necessary "to determine whether any person has violated any provision of the Act (Sections 201-219 of this title), or which may aid in the enforcement of the provisions of this Act (Sections 201-219 of this title)." The Act does not define the Administrator's power to issue subpoenas or specifically authorize him to delegate it to others. But for the purposes of any hearing or investigation, Sec. 9 of the Act makes applicable to the powers and duties of the Administrator, the Chief of the Children's Bureau, and the industry committees, the subpoena provisions of Sections 9 and 10 of the Federal Trade Commission Act. 15 U. S. C. Sections 49 and 50, 15 U. S. C. A. Sections 49, 50. The Administrator is thus given all the powers and respect to subpoenas which are conferred upon the Federal Trade Commission, and no more. Under Section 9 of the Trade Commission Act the Commission may require the attendance and testimony of witnesses, and production of documents by subpoena; and any members of the Commission may sign the subpoenas. The Commission may apply to any district court within whose jurisdiction an investigation is carried on for an order compelling compliance with a subpoena.

The Administrator argues that he is given authority to delegate to regional directors the signing and issuance of subpoenas by Section 4 (c) of the present Act, 29 U. S. C. A. Section 204 (c), and that in any case this authority is to be implied from the structure of the Act and the nature of the duties which are imposed upon him. Section 4 (c) provides: "The principal office of the Administrator shall be in the District of Columbia, but he or his duly authorized representative may exercise any or all of his powers in any place." On its face this seems no more than a definition

of the geographical or territorial jurisdiction of the Administrator and his representatives. The designation of the District of Columbia as the location of the Administrator's principal office is qualified by the provision that either the Administrator or his representative may exercise "his powers" in "any place." Only if such is its meaning does Section 4 (c) comport with the structure and related provisions of the Act.

If, as the Administrator contends, the section is to be read as authorizing delegation of the subpoena power, that authority is without limitation. He may confer the power on any employee appointed under Section 4 (b), whom "he deems necessary to carry out his functions and duties," or even on those who render the voluntary and uncompensated service which he may accept under that section. Moreover, if so read, Section 4 (c) likewise gives the Administrator unrestricted authority to delegate every other power which he possesses, and would render meaningless and unnecessary the provisions of Sec. 11 authorizing the Administrator to delegate his power of investigation to designated representatives.

If such is the meaning of the Act he could delegate at will his duty to report periodically to Congress, Section 4 (d), to appoint industry committees and their chairmen, to fix their compensation and prescribe their procedure, Section 5, to approve or disapprove their reports by orders whose findings of fact, if supported by substantial evidence, are conclusive, Section 10, to define certain terms used in the Act, Section 13, to provide by regulations or orders for the employment of learners and handicapped workers, Section 14, as well as other duties. A construction of the Act which would thus permit the Administrator to delegate all his duties, including those involving administrative judgment and discretion which the Act has in terms given only to him, can hardly be accepted unless plainly required by its words.

The Administrator seeks to meet this difficulty by construing Section 4 (c) as authorizing the delegation of some but not all of his administrative functions. But we

cannot read "any or all" as meaning "some". Any in any case if only some functions can be delegated, we are afforded no legislative guide for determining which may and which may not be delegated. We think that the words of the section, read in their statutory setting, make it reasonably plain that its only function is to provide that the Administrator and his representatives may exercise either within or without the District of Columbia such powers as each possesses. This construction is fully supported by the legislative history of Section 4 (c).

The Administrator also urges that his authority to delegate the subpoena power is to be inferred from the nature of his duties and from the fact that under Section 11 he may through designated representatives gather data and make investigations authorized by the Act. He points to the wide range of duties imposed upon him, the vast extent of his territorial jurisdiction, and the large number of investigations required for the enforcement of the Act. From this he argues that Congress must have intended that he should be permitted to delegate his authority to sign and issue subpoenas. But this argument loses force when examined in the light of related provisions of the Act and of the actual course of Congressional legislation in this field.

Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer. Under the present Act, the subpoena may, as in this case, be used to compell production at a distant place of practically all of the books and records of a manufacturing business, covering considerable period of time. True, there can be no penalty incurred for contempt before there is a judicial order of enforcement. But the subpoena is in form an official command, and even though improvidently issued it has some coercive tendency, either because of ignorance of their rights on the part of those whom it purports to command or their natural respect for what

appears to be an official command, or because of their reluctance to test the subpoena's validity by litigation. All these are cogent reasons for inferring an intention of Congress not to give unrestricted authority to delegate the subpoena power which it has in terms granted only to the responsible head of the agency.

The subpoena power differs materially in these respects from the power to gather data and make investigations which is expressly made delegable by Section 11. Without the subpoena that power is in effect a power of inspection at the employer's place of business to be exercised only on his consent. It is much less burdensome than the requirement of his selection of great numbers of books and papers and their production at other places. Because of these differences it seems to us fairly inferable that the grant of authority to delegate the power of inspection and the omission of authority to delegate the subpoena power shows a legislative intention to withhold the latter. Moreover, if a subpoena power in the regional directors were to be implied from their delegated authority to investigate, we should have to say that Congress had no occasion expressly to grant the subpoena power to the Administrator, who also has the power to investigate, and that the grant to him was superfluous and without meaning or purpose.

The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power. The Interstate Commerce Act, the National Labor Relations Act, and the Federal Trade Commission Act, whose subpoena provisions were adopted by the present Act and by the Packers and Stockyards Act, all fail to grant authority to delegate the issuance of subpoenas. It appears that none of the agencies administering these acts, has construed the authority of its head to include the power to delegate the signing and issuance of subpoenas. On the other hand, Congress, in numerous cases, has specifically authorized delegation of the subpoena power. In others it has granted the power

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 332

J. B. EDWARDS, SECRETARY-TREASURER RELIANCE CLAY PRODUCTS COMPANY, INDIVIDUALLY, AND RELIANCE CLAY PRODUCTS COMPANY, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 49-50) is reported at 189 F. 2d 970. The opinion of the United States District Court for the Northern District of Texas, contained in the preamble to its order (R. 38), is unreported.

JURISDICTION

The judgment of the court below was entered on June 30, 1951 (R. 50). The petition for a writ of certiorari was filed on September 17, 1951. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether the National Labor Relations Board may assign to its regional directors the ministerial function of issuing subpoenas.

STATUTE INVOLVED

The pertinent provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. IV, 141, *et seq.*), are set forth in the Appendix, *infra*, pp. 13-14.

STATEMENT

On May 5, 1950, pursuant to Section 10 of the Act, a complaint was issued alleging that Reliance Clay Products Company had engaged in unfair labor practices in violation of Section 8 (a) (1) and (3) of the Act (R. 11-14). On May 23, 1950, a hearing upon the complaint was begun before a trial examiner of the Board, and the hearing was completed except for the taking of evidence to ascertain whether the operations of the Company affect commerce (R. 6, 31).

Prior to the hearing the Regional Director for the Sixteenth Region of the Board granted a subpoena duces tecum requiring J. B. Edwards, as

secretary-treasurer of the Company, to produce at the hearing specified data pertaining to the Company's commerce (R. 5, 17-19). The subpoena was granted pursuant to the general procedure followed by the Board (R. 20). By this procedure, the Regional Office is supplied by the Washington Office of the Board with blank subpoena forms bearing the seal of the Board and a stamped signature of a member (R. 20). Upon application for a subpoena by a party to a proceeding, the Regional Director, after inserting on the form the name of the person to be served with the subpoena, delivers the form to the applicant who is then responsible for filling in the remainder of the subpoena and for its service (R. 20). In this case, upon application made by counsel for the General Counsel of the Board, the Regional Director on May 16, 1950, authorized issuance of the subpoena which was served on May 18, 1950 (R. 21).

After its service, the Company filed with the trial examiner a petition to revoke the subpoena, claiming in substance that the Regional Director was without authority to issue it and that it was too broad in scope (R. 21-26). The examiner ruled that the subpoena was validly issued, but he narrowed the breadth of the data to be produced, and as so modified he directed compliance with the subpoena (R. 26-30).

Upon refusal to obey the subpoena, the Board filed an application with the United States Dis-

trict Court for the Northern District of Texas for an order requiring obedience to the subpoena (R. 1). The District Court held that the subpoena was validly issued, and after further narrowing its scope, it ordered compliance with it (R. 38-40). Upon appeal, the court below affirmed the District Court, holding that the "Court did not err in directing obedience to the subpoena duces tecum against the contention that it was invalid because, in the circumstances, its issuance constituted an unlawful delegation of power by the National Labor Relations Board to the Regional Director. *National Labor Relations Board* v. *John S. Barnes Corp.*,178 F. 2d 156" (R. 49-50).

ARGUMENT

Section 11 (1) of the Act (Appendix, pp. 13-14, *infra*) provides that "The Board, or any member thereof," shall issue a subpoena upon application of any party to a proceeding under section 10 of the Act. Section 6 of the Board's Rules and Regulations (13 Fed. Reg. 3091, 6266), in effect at the times pertinent to this proceeding, provides in part that:

> *Regional Directors; their delegations of authority.* Under the general supervision and direction of the General Counsel the Regional Directors have the following authority:
>
> * * * * *
>
> (e) *To grant applications for subpenas,* to receive and rule upon or refer to the hearing

> officer or the Board motions to revoke subpenas in representation cases; to receive and refer to the Trial Examiner or the Board motions to revoke subpenas in complaint cases; * * *. [Italics in subsection (e) supplied.]

Thus, by its rules the Board has conferred upon its regional directors the authority to grant subpoenas upon application. Sustained by the court below, in conformity with the thorough opinion of the Court of Appeals for the Seventh Circuit in *National Labor Relations Board* v. *John S. Barnes Corp.*, 178 F. 2d 156, the assignment of this function to regional directors is plainly within the statutory authority of the Board and presents no substantial question warranting review.

1. The exercise of the Board's subpoena power is divided into two steps. The first step deals with the grant of the subpoena, and the second step—not here involved—deals with the revocation of the subpoena.

"Upon application of any party" to the proceeding, it is mandatory upon "the Board, or any member thereof," to grant subpoenas "forthwith." The language of Section 11 (1) and its legislative history make plain that the subpoena must be granted "as a matter of course on the request of any party" (H. Conf. Rep. No. 510, 80th Cong., 1st Sess., 58; 93 Cong. Rec. 6445). The first step is therefore purely ministerial.

The second step brings into play the Board's discretion. A person who is required to produce

evidence in response to a subpoena may within five days after its service "petition the Board to revoke" the subpoena, and the Board is required to revoke it if the data demanded is not relevant or adequately described. Again it is clear from the language of Section 11 (1) and its legislative history that this "procedure for obtaining a subpena" does not dispense "with the requirements of materiality and relevancy." Those questions are merely deferred for ruling "on a motion to quash if the evidence required is not relevant or not described with sufficient particularity" (93 Cong. Rec. 6860).

Before the amendment of the Act in 1947, the Board's subpoena power was defined by Section 11 (1) in the following terms:

> * * * Any member of the Board shall have power to issue subpenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. [49 Stat. 455-456, 29 U. S. C. 161 (1).]

The primary reason which led Congress to change the Board's procedure was to require the grant of the subpoena without any preliminary inquiry into the relevance or the scope of the data requested. *National Labor Relations Board* v. *International Typographical Union,* 76 F. Supp. 895, 897 (S. D. N. Y.).

Accordingly, it is plain that the grant of the subpoena is a ministerial act entailing no exercise of discretion. *National Labor Relations Board* v. *John S. Barnes Corp., supra,* at 160. Since a subpoena must be granted forthwith upon request, and preliminary inquiry into its propriety before issuance is barred, the function performed by a regional director in granting a subpoena is little more than the physical act of delivering a document. The transfer of such a function presents no question of the propriety of a delegation of authority from an agency head to a subordinate official. A problem of delegation exists only where the subordinate official is authorized to perform a discretionary act involving the exercise of independent judgment. Since no act of discretion is embraced in the grant of a Board subpoena, the Board does no more than to utilize its regional directors as its arms in the performance of a ministerial act. The Act obviously contemplates that the Board may designate others to perform acts of this character on its behalf. *National Labor Relations Board* v. *John S. Barnes Corp., supra.*

2. There is no conflict between the decision below and this Court's decision in *Cudahy Packing Co.* v. *Holland,* 315 U. S. 357.

a. In *Cudahy,* where the Administrator under the Fair Labor Standards Act was held not to be authorized to delegate his power to issue subpoenas to subordinates, the act of issuance embraced the

discretionary function of determining the propriety of the subpoena before its grant was effected. Under the National Labor Relations Act, however, the act of issuing a subpoena is a ministerial function entailing no element of discretion. There is nothing in *Cudahy* to suggest that where the issuance of the subpoena is ministerial, its delegation may not be effected. *National Labor Relations Board* v. *John S. Barnes Corp., supra,* at 161.

b. Section 6 of the Act (Appendix, p. 13, *infra*) vests the Board with broad rule-making power authorizing it to adopt "such rules and regulations as may be necessary to carry out the provisions of this Act." As explained by this Court in *Fleming* v. *Mohawk Wrecking & Lumber Co.,* 331 U. S. 111, 121, in upholding the authority of the Administrator under the Emergency Price Control Act to delegate his subpoena power to subordinates, "Such a rule-making power may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld." In *Cudahy,* however, the Administrator had neither rule-making power nor adjudicating power, his subpoena authority being incident only to a power of investigation. Thus, the administrative scheme under the National Labor Relations Act is wholly unlike that involved in *Cudahy. National Labor Relations Board* v. *John S. Barnes Corp., supra,* at 161-162.

c. Section 5 of the Act (Appendix, p. 13, *infra*) states that "The Board may, by one or more of its members *or by such agent or agencies as it may designate,* prosecute any inquiry necessary to its functions in any part of the United States." (Emphasis supplied.) By this provision, authority to grant subpoenas may be delegated to regional directors, since to use subpoena power is preeminently to "prosecute" an "inquiry necessary to" the Board's "functions" for the exercise of which the Board "may designate" agents. *National Labor Relations Board* v. *John S. Barnes Corp., supra,* at 159; see also *Evans* v. *International Typographical Union,* 76 F. Supp. 881, 887 (S. D. Ind.). No comparable provision existed in *Cudahy. National Labor Relations Board* v. *John S. Barnes Corp., supra,* at 161-162. And unlike *Cudahy,* since by this provision the authority to delegate is specifically granted as an incident to the prosecution of inquiries, there does exist a "legislative guide for determining which [functions] may and which may not be delegated" (315 U. S., at 361). See also, *Evans* v. *International Typographical Union,* 76 F. Supp. 881, 889 (S. D. Ind.).

d. In *Cudahy,* this Court reserved decision on whether, as here, the issuance of the subpoena, but not its signing, may be delegated. Discussing the practice of several agencies, including the Board, this Court observed that (315 U. S., at 365, n. 8): "Apparently the actual issuance of subpoenas,

though not their signing, is delegated to subordinates in some of these agencies. *We are not concerned here with the validity of such a practice, since both the signing and issuance of subpoenas is delegated by the Administrator."* (Emphasis supplied.)

This practice of the Board was well known to Congress, for it had been reported to it by the Attorney General's Committee on Administrative Procedure as early as 1941,[1] and it was likewise recorded in the Board's Rules and Regulations which throughout the administration of the Act, before and since amendment, openly and consistently authorized the regional directors of the Board to grant subpoenas.[2] When Congress by amending Section 11 (1) of the Act changed the Board's subpoena procedure, Congress subjected its administration to close scrutiny (*supra,* pp. 5-6). At no point did it intimate any criticism of the Board's practice of entrusting its regional directors with the authority to share in the exercise of subpoena power, and it used no language which would disallow continuance by the Board of its preexisting practice in this regard. "Failure of the Congress, under these circumstances, to expressly forbid the delegation of subpoena power when

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[1] Atty. Gen. Comm. Ad. Proc., NLRB, S. Doc. No. 10, Part 5, 77th Cong., 1st Sess., 18-19; Final Report, Atty. Gen. Comm. Ad. Proc., S. Doc. No. 8, 77th Cong., 1st Sess., 423.

[2] Section 6(e), quoted *supra* at page 4, or a version similar in effect to it, has appeared in the Board's Rules since 1939, when the first rules were adopted.

amending Section 11 (1), must be considered as legislative ratification of the Board's construction and procedure." *National Labor Relations Board* v. *John S. Barnes Corp., supra,* at 161. See also, *National Labor Relations Board* v. *Gullett Gin Co.,* 340 U.S. 361, 365-366.

e. Section 11 (1) of the Act requires that subpoenas shall be issued "forthwith" upon application. If each application for a subpoena were required to be referred to a member of the Board at Washington for his personal action, and if "the proceedings were being held on the West coast or at any other far distant point, the expression 'forthwith' would lose all significance." *National Labor Relations Board* v. *John S. Barnes Corp., supra,* at 160. Furthermore, to facilitate effectuation of its manifold program, the National Labor Relations Act "should be construed so as to give it the administrative flexibility necessary for prompt and expeditious action on a multitude of fronts." *National Labor Relations Board* v. *John S. Barnes Corp., supra,* at 162; cf. *Fleming* v. *Mohawk Wrecking & Lumber Co.,* 331 U. S. 111, 122.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

MOZART G. RATNER,
Assistant General Counsel,

BERNARD DUNAU,
Attorney,
National Labor Relations Board.

OCTOBER, 1951.

APPENDIX

The relevant provisions of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. IV, 141 *et seq.*), are as follows:

* * * * *

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

* * * * *

"INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examina-

tion, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

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